Matchplan (M) Sdn Bhd & Anor v William D Sinrich & Anor

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–02–75 OF 2000
GOPAL SRI RAM, ABDUL AZIZ JJCA AND AZMEL J
13 JANUARY 2004

Civil Procedure — Service — Out of jurisdiction — Setting aside — Alleged tort in facsimile message sent out of London — Principles governing jurisdiction — Rules of the High Court 1980 O 11, Courts of Judicature Act 1964 s 23(1)

Civil Procedure — Service — Out of jurisdiction — Setting aside — Whether tort committed within jurisdiction — Whether it is enough if those facts are alleged to have occurred within the court's jurisdiction — Whether there should be a preliminary inquiry through a trial on affidavits

On 3 September 1996, the second respondent sent a facsimile message addressed to the second appellant at Kuala Lumpur. It was transmitted to the fax number of the first appellant also at Kuala Lumpur and was sent out of London. It was prepared on the letterhead of the second respondent. It was signed by the first respondent. On its face, it appeared to have been copied to four other persons (two of these persons are within Malaysia). The appellants commenced a libel action against the respondents in the High Court at Kuala Lumpur. They applied for and obtained leave under O 11 r 1 of the Rules of the High Court 1980 ('the RHC') to serve their writ out of jurisdiction on the respondents in England. The respondents entered a conditional appearance to the writ and applied for it to be set aside. The learned senior assistant registrar dismissed the application. The judge in chambers, on appeal to him, allowed the application and the appellants appealed. The question that then arises is: was there publication within the jurisdiction? The appellants said there was. And in support of their contention, they relied on the contents of the respondent's facsimile. The respondents said there was no publication within the jurisdiction. In support of their case, they relied on an affidavit filed by them in which they say that although their facsimile showed it being copied to the two other persons within the jurisdiction, no copy was ever sent to these persons. The respondents argued that their denial of publication, unchallenged by the appellants at the interlocutory stage, concludes the matter in their favour.

Held, allowing the appeal (by a majority):

(1) (per **Gopal Sri Ram JCA** and **Azmel J**) Jurisdiction here referred to the authority of the High Court in three senses, namely, jurisdiction over the parties; jurisdiction over the subject matter of the action; and jurisdiction over the cause of action (see para 5).

(2) (per **Gopal Sri Ram JCA** and **Azmel J**) For the appellants to succeed in the instant appeal, they must show one of two things. Either that the tort of libel of which they complained was committed within the jurisdiction, or, that the facts on which their action in tort was based

A are alleged to have occurred within the High Court's jurisdiction. If the plaintiffs are right in their argument on the facts, then this is a case that falls both under s 23(1)(a) and (c) of the Courts of Judicature Act 1964 ('the CJA') as well as under para (h) of O 11 r 1 of the RHC which empowers the court to grant leave to a plaintiff to serve a writ out of jurisdiction 'if the action begun by the writ is founded on a tort committed within the jurisdiction'. So it does not really matter which of these provisions is relied upon to found jurisdiction in this case (see paras 11 and 12).

(3) (per **Gopal Sri Ram JCA** and **Azmel J**) If the alleged libel was published to persons within the local jurisdiction of the High Court in Malaya, the tort of defamation would have been committed within the jurisdiction. For it is publication within the jurisdiction that gives rise to the cause of action in defamation. Under s 23(1)(c) of the CJA there is no burden on the plaintiffs to prove to a conviction that the facts on which their action is based (that is to say the action for defamation) exist within the jurisdiction of the High Court. It is enough if those facts are alleged to have occurred within the court's jurisdiction. Consequently, the plaintiffs are under no duty to adduce positive evidence to disprove the defendants' contention that there was no publication. The plaintiffs have alleged that the defamatory statement was published to two persons within the jurisdiction. That is sufficient to bring them within the purview of s 23(1)(c) (see paras 13 and 25).

(4) (per **Gopal Sri Ram JCA** and **Azmel J**) The merits of the appellants' claim that there was publication were yet to be tried. The mere *ipse dixit* of the respondent that there was no publication cannot be determinative of the matter. At the point of determining whether the tort of defamation was committed within the jurisdiction, all the allegations in the statement of claim must be presumed to be true. At that stage there was no preliminary inquiry through a trial on affidavits as to whether the defamatory material was indeed published within the jurisdiction. Were it otherwise, there is a risk that applications to discharge an order granting leave under O 11 r 1 may turn out to be mini trials without determining the suit on its merits (see para 17).

(5) (per **Abdul Aziz JCA** dissenting) For service of the writ on the respondents outside the jurisdiction, the appellants relied on O 11 r 1(1)(h) of the RHC which rendered permissible service of a writ out of the jurisdiction with the leave of the court. For the tort of libel to be committed within the jurisdiction, the publication of the matter complained of must be to a third party within the jurisdiction. Otherwise, no tort of libel was committed within the jurisdiction, O 11 r 1(1)(h) of the RHC would not apply, the Malaysian courts would have no jurisdiction over the case against a foreign defendant, the service of the notice of the writ in this case on the respondents outside the jurisdiction would not have been permissible, and the service of the writ on them — and effectively the action against them — could be set aside under O 12 r 7(1) RHC (see para 45).

(6) (per **Abdul Aziz JCA** dissenting) If on the hearing of the respondents' application, it could be established that there was no publication in Malaysia to those two persons, the action merited being set aside, for there would have been no point in going to trial to establish otherwise. What the judge had before him was a solemn averment in an affidavit as to a fact that was capable of being verified to be untrue if it was untrue, that is, that copies of the letter were not sent to those two persons. In this case, the appellants did not respond by affidavit to the averment, thereby failing to show the stand that they took as to the fact in face of the averment. In the circumstances, it was concluded that the judge was right in accepting the averment as true (see para 47).

(7) (per **Abdul Aziz JCA** dissenting) At the setting aside stage, conflicting evidence or arguments do, and have to, arise as to the truth of the assumed facts on the basis of which leave was earlier granted. At the setting aside stage, 'the nettle must be grasped'. It means that, faced with the applicant's averments which raise disputes of fact, the plaintiff must fight out the dispute and persuade the judge that he has a good arguable case that the facts contended for by him are true. He cannot fall back on his success in obtaining the leave which he obtained only on the assumption that the facts were true. Now, at the setting aside stage, he must show that, despite the applicant's contentions, there is still a good arguable case that his facts are true. The applicant, on his part, has to be entitled show that there is not even a good arguable case that the plaintiff's facts are true (see paras 59 and 60).

Obiter:

(1) (per **Gopal Sri Ram JCA** and **Azmel J**) The question as to whether there was publication, and to whom, was a matter that required to be resolved at the trial after hearing all relevant *viva voce* evidence. Even assuming that the appellants may not be able to prove at the trial that there was publication to the two Malaysians mentioned in the respondent's facsimile, they may nevertheless be able to succeed by proving publication to other third parties in Malaysia: persons other than those whose names appear in the facsimile. Although the statement of claim in the present case relied on publication only to the two persons within the jurisdiction, this was not fatal to the issue at hand. For, it was open to the appellants at any time, during or after case management, to amend their statement of claim and allege a wider publication in the sense already discussed. Further, there was no duty on the appellants to adduce evidence at this stage to prove actual publication. That, on the authorities was a matter to be left for the trial proper (see paras 19 and 23).

[Bahasa Malaysia summary

Pada 3 September 1996, responden kedua telah menghantar pesanan faksimili yang dialamatkan kepada perayu kedua di Kuala Lumpur. Ia telah dihantar melalui nombor faks perayu pertama juga di Kuala Lumpur dan dihantar

ke luar London. Ia disediakan atas kepala surat responden kedua. Ia ditandatangani oleh responden pertama. Pada dasarnya, ia kelihatan seperti telah dibuat salinan kepada empat orang lain (dua daripadanya dalam Malaysia). Perayu-perayu telah memulakan satu tindakan libel terhadap responden-responden di Mahkamah Tinggi Kuala Lumpur. Mereka telah memohon untuk dan memperoleh kebenaran di bawah A 11 k 1 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') untuk menyampaikan writ di luar bidang kuasa mereka ke atas responden-responden di England. Responden-responden telah memasuki satu kehadiran bersyarat terhadap writ tersebut dan memohon ia diketepikan. Penolong kanan pendaftar yang bijaksana telah menolak permohonan tersebut. Hakim dalam kamar, semasa rayuan dihadapkan kepadanya, telah membenarkan permohonan tersebut dan perayu-perayu telah membuat rayuan. Persoalan yang kemudiannya timbul adalah: sama ada terdapat penerbitan dalam bidang kuasa? Perayu-perayu mengatakan ada. Dan bagi menyokong hujah mereka, mereka bergantung kepada kandungan faksimili responden. Responden-responden mengatakan tidak ada penerbitan dalam bidang kuasa. Bagi menyokong kes mereka, mereka bergantung kepada afidavit yang difailkan oleh mereka yang menyatakan bahawa walaupun faksimili mereka menunjukkan ia telah disalinkan kepada dua orang lain dalam bidang kuasa, tiada salinan telah dihantar kepada mereka. Responden-responden berhujah bahawa penafian mereka tentang penerbitan tersebut, tidak dicabar oleh perayu-perayu di peringkat interlokutori, memberi kesimpulan yang berpihak kepada mereka.

Diputuskan, membenarkan rayuan tersebut (secara majoriti):

(1) (oleh **Gopal Sri Ram HMR** dan **Azmel H**) Bidang kuasa di sini merujuk kepada kuasa Mahkamah Tinggi dalam tiga bentuk, iaitu, bidang kuasa ke atas pihak-pihak; bidang kuasa ke atas perkara pokok tindakan; dan bidang kuasa ke atas kausa tindakan (lihat perenggan 5).

(2) (oleh **Gopal Sri Ram HMR** dan **Azmel H**) Untuk perayu-perayu berjaya dalam rayuan semasa, mereka perlu menunjukkan salah satu daripada dua perkara. Sama ada tort libel yang mereka adukan telah dilakukan dalam bidang kuasa, atau bahawa fakta-fakta yang mana tindakan tort mereka didasari dikatakan telah berlaku dalam bidang kuasa Mahkamah Tinggi. Sekiranya plaintif-plaintif adalah betul dalam hujah mereka berdasarkan fakta-fakta tersebut, maka ini adalah satu kes yang terangkum di bawah s 23(1)(a) dan (c) Akta Kehakiman (Mahkamah) 1964 ('AMK') dan juga di bawah perenggan (h) kepada A 11 k 1 KMT yang memberi kuasa kepada mahkamah untuk memberikan kebenaran kepada plaintif menyampaikan writ di luar bidang kuasa 'if the action begun by the writ is founded on a tort committed within the jurisdiction'. Oleh itu tidak kiralah mana-mana daripada peruntukan tersebut digunakan untuk memutuskan bidang kuasa dalam kes ini (lihat perenggan-perenggan 11 dan 12).

(3) (oleh **Gopal Sri Ram HMR** dan **Azmel H**) Sekiranya libel yang dikatakan telah diterbitkan kepada mereka dalam bidang kuasa dalam negeri Mahkamah Tinggi di Malaya, tort fitnah hendaklah berlaku dalam bidang kuasa. Ini adalah kerana penerbitan dalam bidang kuasalah

yang menimbulkan kausa tindakan dalam fitnah. Di bawah s 23(1)(c) AMK tiada beban atas plaintif-plaintif untuk membuktikan sabitan bahawa fakta-fakta di mana tindakan mereka didasari (iaitu tindakan fitnah) wujud dalam bidang kuasa Mahkamah Tinggi. Adalah mencukupi jika fakta-fakta tersebut dikatakan telah berlaku dalam bidang kuasa mahkamah. Berikutan itu, plaintif-plaintif bukan di bawah satu tanggungjawab untuk mengemukakan keterangan positif untuk mematahkan hujah defendan-defendan bahawa tidak terdapat sebarang penerbitan. Plaintif-plaintif telah mengatakan bahawa kenyataan fitnah tersebut telah diterbitkan kepada dua orang dalam bidang kuasa. Ini adalah mencukupi untuk membawa mereka dalam skop s 23(1)(c) (lihat perenggan-perenggan 13 dan 25).

(4) (oleh **Gopal Sri Ram HMR** dan **Azmel H**) Merit tuntutan perayu-perayu bahawa terdapat satu penerbitan masih belum dibicarakan. Hanya *ipse dixit* responden bahawa tiada penerbitan tidak boleh menentukan perkara tersebut. Apabila menentukan sama ada tort fitnah telah dilakukan dalam bidang kuasa, semua pengataan dalam pernyataan tuntutan hendaklah dianggap benar. Di peringkat tersebut tiada siasatan awalan melalui satu perbicaraan ke atas afidavit-afidavit berhubung sama ada bahan yang berunsur fitnah tersebut memang telah diterbitkan dalam bidang kuasa. Jika sebaliknya, terdapat risiko bahawa permohonan untuk membatalkan perintah memberikan kebenaran di bawah A 11 k 1 menjadi satu perbicaraan kecil tanpa menentukan guaman atas meritnya (lihat perenggan 17).

(5) (oleh **Abdul Aziz HMR** menentang) Untuk penyampaian writ ke atas responden-responden di luar bidang kuasa, perayu-perayu bergantung kepada A 11 k 1(1)(h) KMT yang membenarkan penyampaian writ diluar bidang kuasa dengan kebenaran mahkamah. Bagi tort libel dilakukan dalam bidang kuasa, penerbitan perkara yang diadukan mestilah dari satu pihak ketiga dalam bidang kuasa. Jika tidak, tiada tort libel telah dilakukan dalam bidang kuasa, A 11 k 1(1)(h) KMT tidak akan terpakai, mahkamah Malaysia tidak akan mempunyai bidang kuasa ke atas kes terhadap defendan dari negara asing, penyampaian notis writ dalam kes ini ke atas responden-responden di luar bidang kuasa tidak boleh dibenarkan, dan penyampaian writ ke atas mereka — dan secara efektifnya tindakan terhadap mereka — boleh diketepikan di bawah A 12 k 7(1) KMT (lihat perenggan 45).

(6) (oleh **Abdul Aziz HMR** menentang) Sekiranya semasa perbicaraan permohonan responden-responden, ia boleh dibuktikan bahawa tiada penerbitan di Malaysia kepada dua orang tersebut, tindakan yang ini patut dimeritkan) diketepikan, kerana tiada guna untuk dibicarakan bagi membuktikannya. Apa yang di hadapan hakim, adalah penegasan dalam satu affidavit berhubung fakta yang boleh disahkan sebagai tidak benar jika ia tidak benar, iaitu, bahawa salinan surat tersebut tidak dihantar kepada kedua-dua orang tersebut. Dalam kes ini, perayu-perayu tidak menjawab melalui afidavit berhubung penegasan tersebut, dan oleh itu telah gagal untuk menunjukkan pendirian yang mereka ambil berkaitan fakta berhubung penegasan tersebut. Dalam

keadaan tersebut, ia telah diputuskan bahawa hakim adalah betul dengan menerima penegasan tersebut sebagai suatu yang benar (lihat perenggan 47).

(7) (oleh **Abdul Aziz HMR** menentang) Di peringkat penepian, keterangan atau hujah yang bercanggah telah, dan perlu, timbul demi kebenaran fakta-fakta yang diandaikan atas dasar mana kebenaran telah diberikan sebelum ini. Di peringkat penepian, 'the nettle must be grasped'. Ia bermaksud bahawa, berhadapan dengan penegasan perayu yang menimbulkan pertikaian-pertikaian fakta, plaintif perlu membahaskan pertikaian dan meyakinkan hakim bahawa beliau mempunyai kes yang boleh dihujahkan di mana fakta-fakta yang dihujahkan oleh beliau adalah benar. Beliau tidak boleh bergantung kepada kejayaan memperoleh kebenaran yang telah diperolehi oleh beliau hanya atas andaian bahawa fakta-fakta tersebut adalah benar. Sekarang, di peringkat penepian, beliau perlu menunjukkan bahawa, meskipun hujah-hujah perayu, masih terdapat satu kes yang boleh dibicarakan bahawa fakta-fakta beliau adalah benar. Perayu, di pihaknya, perlu layak menunjukkan bahawa tiada kes yang boleh dihujahkan di mana fakta-fakta plaintif adalah benar (lihat perenggan-perenggan 59 dan 60).

Obiter:

(oleh **Gopal Sri Ram HMR** dan **Azmel H**) Persoalan sama ada terdapat penerbitan, dan kepada siapa, adalah satu perkara yang perlu diselesaikan di perbicaraan selepas mendengar semua keterangan *viva voce* yang relevan. Walaupun dengan mengandaikan bahawa perayu-perayu mungkin tidak dapat membuktikan semasa perbicaraan bahawa terdapat penerbitan kepada kedua-dua rakyat Malaysia yang disebutkan dalam faksimili responden, mereka mungkin bagaimanapun boleh berjaya membuktikan penerbitan kepada pihak-pihak ketiga di Malaysia: mereka selain daripada nama yang disebutkan dalam faksimili tersebut. Walaupun pernyataan tuntutan dalam kes semasa bergantung kepada penerbitan kepada hanya dua orang dalam bidang kuasa tersebut, ini tidak memudaratkan persoalan semasa. Kerana, ia adalah terbuka kepada perayu-perayu pada bila-bila masa, semasa atau selepas pengendalian kes, untuk meminda pernyataan tuntutan mereka dan mengatakan satu penerbitan yang lebih luas sedemikian yang telahpun dibincangkan. Tambahan pula, bukanlah tanggungjawab perayu-perayu untuk mengemukakan keterangan di peringkat ini untuk membuktikan penerbitan sebenar. Oleh itu, berdasarkan autoriti-autoriti tersebut terdapat perkara yang perlu dibicarakan dengan betul (lihat perenggan-perenggan 19 dan 23).]

Notes

For cases on service out of jurisdiction, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 5270–5297.

For service out of jurisdiction, see 1 *Halsbury's Laws of Malaysia* (2002 Reissue) para [10.2-071].

Cases referred to

American Express Bank Ltd v Mohamed Toufic Al-Ozeir & Anor [1995] 1 MLJ 160 (refd)
Attock Cement Co Ltd v Romanian Bank for Foreign Trade [1989] 1 All ER 1189 (refd)
Bata v Bata [1948] 92 Sol Jo 574 (refd)
Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331 (refd)
British South Africa Company v Companhia de Moçambique [1893] AC 602 (refd)
Carrick v Hancock [1895] 12 TLR 59 (refd)
Dow Jones & Co Inc v Gutnick [2003] 194 ALR 433 (refd)
Eyre v Nationwide News Pty Ltd [1967] NZLR 851 (refd)
Gaskin v Retail Credit Co [1965] SCR 297 (refd)
Hesperides Hotels Ltd v Muftizade [1979] AC 508 (refd)
Huth v Huth [1915] 3 KB 32 (refd)
Lipohar v The Queen [1999] 200 CLR 485 (refd)
Malayan Banking Berhad v International Tin Council and another appeal [1989] 3 MLJ 286 (refd)
Pearce v Ove Arup Partnership [1997] Ch 293 (refd)
Penn v Lord Baltimore [1750] 27 ER 1132 (refd)
Potter v Broken Hill Pty Co Ltd [1906] 3 CLR 479 (refd)
Pullman v Walter Hill & Co [1891] 1 QB 524 (refd)
Razelos v Razelos (No 2) [1970] 1 WLR 392 (refd)
Rediffusion (Hong Kong) Ltd v Attorney-General of Hong Kong [1970] AC 1136 (refd)
Richard West & Partners (Inverness) Ltd v Dick [1969] 2 Ch 424 (refd)
Tyburn Productions Ltd v Conan Doyle [1991] Ch 75 (refd)
Vanity Fair Mills Inc v T Eaton Co Ltd [1956] 25 CPR 6 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 23(1)(a), (b), (c)
Federal Rules of Civil Procedure [US] r 12(b)
Rules of the High Court 1980 O 10, O 11 r 1(1)(h), O 12 r 7(1), O 62

Appeal from: Suit No S2–22–561 of 1997 (High Court, Kuala Lumpur)

PS Gill (Harjit Singh with him) (Gill & Tang) for the appellants.
Lorraine Cheah (Shearn Delamore & Co) for the respondents.

Gopal Sri Ram JCA (delivering majority judgment):

[1] This appeal raises a short but interesting point in the context of private international law. It has to do with whether the High Court in Malaya has jurisdiction to try the plaintiffs' action for libel against the defendant. There is of course no new point of law here. It is merely a matter of applying settled principles to the particular facts of this case. And those facts, in so far as relevant to the narrow point here, may be shortly stated.

[2] On 3 September 1996, the second defendant sent a facsimile message addressed to the second plaintiff at Kuala Lumpur. It was transmitted to the

fax number of the first plaintiff also at Kuala Lumpur. It was sent out of London. It was prepared on the letterhead of the second defendant. It was signed by the first defendant. On its face, it appears to have been copied to four other persons (two of these persons are within Malaysia). That is to say, they are within the jurisdiction of the High Court. Of that there is no dispute.

[3] It is the plaintiffs' case that the facsimile message in question contains defamatory matter. They therefore instituted the present action against the defendants. Their claim is based in tort. They applied for and obtained leave under O 11 r 1 of the Rules of the High Court 1980 ('the RHC') to serve their writ out of jurisdiction on the defendants in England. The defendants entered a conditional appearance to the writ and applied to discharge the order granting leave. They succeeded. The plaintiffs now appeal to us.

[4] Before dealing with the merits of this appeal, it is appropriate that this opportunity be taken to re-state the principles generally governing jurisdiction in the field of private international law. They are beyond argument.

[5] To begin with, as a matter of private international law, the High Court in Malaya (and this applies equally to the High Court in Sabah and Sarawak) may entertain an action *in personam* only if it has jurisdiction to do so. It is to be emphasized that the expression 'jurisdiction' is one that may be used in a variety of senses and therefore takes its colour from the context of its use (see *Lipohar v The Queen* [1999] 200 CLR 485, at pp 516–517). In the present context, it refers to the authority of the High Court in three senses, namely, jurisdiction over the parties; jurisdiction over the subject matter of the action; and jurisdiction over the cause of action.

[6] First, jurisdiction over parties. The jurisdiction of the High Court is available to any plaintiff, Malaysian or foreign, save an enemy alien in time of war (see *Porter v Freudenberg* [1915] 1 KB 857). Next, any defendant, save those immune from suit, for example, foreign sovereigns, diplomats and other consular officers protected by written law, may be impleaded as a defendant to an action governed by principles of private international law.

[7] Second, jurisdiction over the subject matter of the action. Here, it is settled by what has come to be known as the rule in the *Mocambique* (see *British South Africa Company v Companhia de Moçambique* [1893] AC 602) that the High Court has no jurisdiction to adjudicate upon rights of property in or the possession of foreign immovable property even though the parties to the dispute are domiciled or resident in Malaysia (see *Potter v Broken Hill Pty Co Ltd* [1906] 3 CLR 479; *Hesperides Hotels Ltd v Muftizade* [1979] AC 508). The rule in the *Mocambique* may apply to foreign movable property as well (see *Tyburn Productions Ltd v Conan Doyle* [1991] Ch 75; *Pearce v Ove Arup Partnership* [1997] Ch 293). However, *in personam* relief may be decreed in an action relating to foreign property if the defendant is resident within the jurisdiction of the High Court (see *Penn v Lord Baltimore* [1750] 27 ER 1132; *Richard West & Partners (Inverness) Ltd v Dick* [1969] 2 Ch 424).

[8] Third, jurisdiction over the cause of action. The jurisdiction of the High Court over a cause of action rests on the twin pillars of effectiveness and submission. Effectiveness means that any judgment of the court in the given dispute can be enforced. Submission refers to a defendant submitting to the jurisdiction of the court. Absent either of these, the court cannot seise itself of the cause of action. In Malaysia, the High Court is seised of jurisdiction over a dispute in any of the following three cases:

(i) where the defendant is served with the writ or other originating process within the jurisdiction; or

(ii) where any of the conditions set out in s 23 of the Courts of Judicature Act 1964 ('the CJA') are satisfied; or

(iii) where a plaintiff is able to obtain leave of court to serve a defendant who is outside the jurisdiction of the court pursuant to O 11 of the RHC.

[9] At common law, jurisdiction is founded on personal service on a defendant present within the jurisdiction. It is of no moment that the defendant's presence is transient (see *Carrick v Hancock* [1895] 12 TLR 59; *Razelos v Razelos (No 2)* [1970] 1 WLR 392). Personal service here refers to one or more of the methods of service specified by O 10 read with O 62 of the RHC.

[10] It is now settled by binding authority that the High Court may exercise jurisdiction over a non-resident defendant pursuant to s 23(1) of the CJA (see *Malayan Banking Berhad v International Tin Council and another appeal* [1989] 3 MLJ 286). The relevant part of the section reads as follows:

> 23(1) Subject to the limitations contained in Article 128 of the Constitution every High Court shall have jurisdiction to try all civil proceedings where —
>
> (a) the cause of action arose, or
>
> (b) the defendant or one of several defendants resides or has his place of business, or
>
> (c) the facts on which the proceedings are based exist or are alleged to have occurred, or
>
> (d) any land the ownership of which is disputed is situated, within the local jurisdiction of the Court …

[11] In *Malayan Banking Berhad v International Tin Council*, it was held (per Mohd Azmi SCJ) that in Malaysia service is not solely the foundation of jurisdiction of the High Court and that apart from O 11 r 1, s 23(1)(b) of the CJA confers extra-territorial jurisdiction on the High Court in cases falling within the section. In that case, the facts fell within s 23(1)(b). In the present case, the relevant provisions are both paras (b) and (c) of s 23(1). In other words, for the appellants to succeed in the instant appeal they must show one of two things. Either that the tort of libel of which they complain was committed within the jurisdiction. Or, that the facts on which their action in tort is based are alleged to have occurred within the High Court's jurisdiction. If they demonstrate either of these things, then they would *exdebito justitae* entitled to have their writ served pursuant to O 11 r 1 of the

RHC. Once the court is seised of extra territorial jurisdiction by virtue of s 23(1), O 11 r 1 ceases to be of jurisdictional relevance. The decision in *Malayan Banking Bhd v International Tin Council* makes it plain that O 11 r 1 assumes jurisdictional importance only in cases falling outside the scope of s 23(1). Accordingly, in cases where s 23(1) applies, O 11 r 1 becomes a mere procedural formality to enable a plaintiff to effect service abroad.

[12] In the present case, if the plaintiffs are right in their argument on the facts, then this is a case that falls both under s 23(1)(a) and (c) of the CJA as well as under para (h) of O 11 r 1 of the RHC which empowers the court to grant leave to a plaintiff to serve a writ out of jurisdiction 'if the action begun by the writ is founded on a tort committed within the jurisdiction'. So it does not really matter which of these provisions is relied upon to found jurisdiction in this case.

[13] It is trite that publication of an alleged libel to some person other than the plaintiff is the *sine qua non* of the tort. Absent the ingredient of publication, there is no cause of action in defamation (see *Pullman v Walter Hill & Co* [1891] 1 QB 524). On the facts pleaded in the statement of claim, if the alleged libel was published to persons within the local jurisdiction of the High Court in Malaya, the tort of defamation would have been committed within the jurisdiction. For it is publication within the jurisdiction that gives rise to the cause of action in defamation (see *Bata v Bata* [1948] 92 Sol Jo 574; *Eyre v Nationwide News Pty Ltd* [1967] NZLR 851; *Dow Jones & Co Inc v Gutnick* [2003] 194 ALR 433). In any event, if the plaintiffs allege that publication occurred within the jurisdiction, that is sufficient to enable the High Court to seise itself of jurisdiction over the dispute.

[14] The first ground may be taken now, namely, whether the cause of action arose within the jurisdiction. The question that then arises is: was there publication within the jurisdiction? The plaintiffs say there was. And in support of their contention, they rely on the contents of the defendant's facsimile. The defendants say there was no publication within the jurisdiction. In support of their case, they rely on an affidavit filed by them in which they say that although their facsimile shows it being copied to the two other persons within the jurisdiction, no copy was ever sent to these persons. The defendants argue that their denial of publication, unchallenged by the plaintiffs at the interlocutory stage, concludes the matter in their favour. Meaning no disrespect to learned counsel for the defendants, the argument advanced is over-simplistic and devoid of any merit in that it overlooks certain fundamental principles that operate in the environment of adjectival law.

[15] It is elementary law that for the purpose of determining whether the High Court at Kuala Lumpur has jurisdiction over the defendants, the allegations made by the plaintiffs in their statement of claim must be assumed to be true. Thus, in *Vanity Fair Mills Inc v T Eaton Co Ltd* [1956] 25 CPR 6, Waterman J observed as follows:

> Although the parties presented many affidavits, depositions, and exhibits for the consideration of the district court, there has been no trial of facts, and the complaint is unanswered. *On an appeal from a judgment granting a motion to dismiss a complaint*

for lack of federal jurisdiction, we must assume the truth of the facts stated in the complaint. (Emphasis added.)

[16] See also *Rediffusion (Hong Kong) Ltd v A-G of Hong Kong* [1970] AC 1136 per Lord Diplock.

[17] So too here. The merits of the plaintiffs' claim that there was publication are yet to be tried. The mere *ipse dixit* of the defendant that there was no publication cannot be determinative of the matter. At the risk of repetition, it needs to be said that at the point of determining whether the tort of defamation was committed within the jurisdiction, all the allegations in the statement of claim must be presumed to be true. At that stage there is no preliminary inquiry through a trial on affidavits as to whether the defamatory material was indeed published within the jurisdiction. Were it otherwise, there is a risk that applications to discharge an order granting leave under O 11 r 1 may turn out to be mini trials without determining the suit on its merits.

[18] Whether publication had taken place is a jury question, that is to say, it is an issue of fact. So, in *Gaskin v Retail Credit Co* [1965] SCR 297, Ritchie J who delivered the judgment on behalf of the majority of the Canadian Supreme Court said:

> There can be no doubt that proof of publication is an essential element in an action for libel and that the burden of proving this element lies upon the plaintiff. The question of whether or not that burden has been discharged is, in my opinion, one which should be left for the jury to determine, if there is any evidence from which it might reasonably be concluded to be more probable than not that a defamatory statement concerning the plaintiff has been made known to a third party or parties.

[19] Accordingly, the question as to whether there was publication, and to whom, is a matter that requires to be resolved at the trial after hearing all relevant *viva voce* evidence. Even assuming that the plaintiffs may not be able to prove at the trial that there was publication to the two Malaysians mentioned in the defendant's facsimile, they may nevertheless be able to succeed by proving publication to other third parties in Malaysia: persons other than those whose names appear in the facsimile. The true principle is that set out in the second edition of Dr Spencer Bower's classic work, *The Law of Actionable Defamation* as follows:

> Where the communication, though purporting or expressed to be made only to the person of whom the matter is defamatory, is yet made in such a form, or by such a medium, as to admit of the possibility of the defamatory matter in the ordinary course of events coming to the notice of other persons also, such communication constitutes publication in law by the person making the same, unless and until he proves that, in fact, the defamatory matter did not come to the notice of any one of such other persons.

[20] In *Huth v Huth* [1915] 3 KB 32, at p 38, Lord Reading CJ said:

> It has been laid down — I think rightly — that the court will take judicial notice of the nature of the document, ie, that it is a postcard, and will presume, in the absence of evidence to the contrary, that others besides the person to whom it is addressed will read and have in fact read what is written thereon. That is the

presumption of fact which arises as a matter of law. If, even in such a case as that, the defendant could establish that the postcard never was read by a single person — although it is very difficult to conceive that the proof could be given — he would, notwithstanding the presumption, succeed in the action, because he would have proved that there was no publication. The fact that it is practically impossible to prove that any third person read it is the reason why the law takes judicial notice of the nature of the document, and says that the mere fact that the words are written on a postcard which is posted must be taken as some evidence that a third person will read it, or has read it. That is clear law and is quite beyond dispute.

[21] Admittedly these words were spoken at a time when communication by facsimile was not even remotely in mind. Yet they hold true even in today's world where the method and medium of national and international communication has altered. It is amply clear that on a purely practical footing there is no difference between a defamatory statement contained in a postcard or a telegram and a facsimile message. Just as it is presumed in a plaintiff's favour that the contents of a postcard or a telegram would be read by third parties, so too it should be presumed that the contents of a facsimile message would be read by persons other than the addressee at the point of receipt. Unless such a presumption is made available — by analogy with the telegram and postcard cases — plaintiffs will be hard put to prove actual publication in facsimile cases. The presumption is one of fact that arises upon proof of certain primary facts raising a prima facie inference that there must, in the ordinary course of events, have been publication to a third party. The presumption may be rebutted by a defendant by showing that not one person actually read the defamatory facsimile message. Of course, there may be particular circumstances in which the presumption is so strong that it may become impossible to rebut.

[22] Take an obvious example. A facsimile message defamatory of *A* is sent by *B* to *A* who works in a large office. Evidence is led by *A* to show that the facsimile machine is situated in a general area in *A*'s office and that several employees have ready access to the machine either to send or to receive messages. Upon proof of these basic or primary facts, the court may presume that there was publication to one or more third parties. In such circumstances the defendant may find it difficult, if not impossible, to show that there was no publication unless it can be shown that no one other than *A* himself read the document. It goes without saying that the presumption may be strong or weak according to the facts of each case.

[23] Now, it is true that the statement of claim in the present case relies on publication only to the two persons within the jurisdiction. But this is not fatal to the issue at hand. For, it is open to the plaintiffs at any time, during or after case management, to amend their statement of claim and allege a wider publication in the sense already discussed. Further, there is no duty on the plaintiffs to adduce evidence at this stage to prove actual publication. That, on the authorities was a matter to be left for the trial proper.

[24] On the material presented to the court below, there was an allegation of publication within the jurisdiction reasonably supported by the contents of the defendants' own document. Against that was the bare denial by the defendants that there was no such publication as alleged.

[25] That brings you to s 23(1)(c) of the CJA. That provision has already been referred to earlier in this judgment. Under this section there is no burden on the plaintiffs to prove to a conviction that the facts on which their action is based (that is to say the action for defamation) exist within the jurisdiction of the High Court. It is enough if those facts *are alleged to have occurred* within the court's jurisdiction. That is what the latter part of s 23(1)(c) says. Nothing more; nothing less. Consequently, the plaintiffs are under no duty to adduce positive evidence, as suggested by learned counsel for the defendants, to disprove the defendants' contention that there was no publication. The plaintiffs have alleged that the defamatory statement was published to two persons within the jurisdiction. That is sufficient to bring them within the purview of s 23(1)(c).

[26] Based on the foregoing discussion it is clear that the High Court cast on the plaintiffs a burden which the law does not. Prima facie, the facts of this case come squarely within s 23(1)(a) and O 11 r 1(h) or alternatively within s 23(1)(c). But all this does not mean that the issue of publication is concluded against the defendants. It is open to them, in the ordinary way, to show at the trial that there was no publication as alleged by the plaintiffs or at all.

[27] The appeal was accordingly allowed and the orders usually consequent upon success in a case as this were made.

[28] One last point. The decision in this case which was pronounced at the conclusion of arguments was reached by a majority with our learned brother Abdul Aziz JCA dissenting. This is the majority judgment.

Abdul Aziz JCA (delivering dissenting judgment):

[29] According to the statement of claim in this case, the first appellant company ('Matchplan') was incorporated in Malaysia and is a sports-event marketing company with a place of business in Malaysia, and the second appellant ('Wilmott') is the company's managing director. The first respondent ('Sinrich') is the Senior International Vice-President, Production and Development, resident in London, of the second respondent company ('TWI'), which was incorporated in the United States of America and has its place of business in London.

[30] The appellants commenced a libel action against the respondents in the High Court at Kuala Lumpur. The respondents applied for it to be set aside. The learned senior assistant registrar dismissed the application. The judge in chambers, on appeal to him, allowed the application. The appellants appealed to this court.

[31] The appellants' action was based on two letters to Wilmott from TWI in London, signed by Sinrich. The appellants claimed that certain statements in the two letters were defamatory of them. It is not clear from the two letters what the business relationship was between TWI and Matchplan or what actually the problem was between them that gave rise to the two letters, and besides the letters there was no other evidence as to that

in the appeal, but it would appear from the letters that the problem centred on an upcoming cricketing event, the ACC Trophy, for which TWI was planning to provide broadcasting coverage in or from Malaysia, for the purposes of which Matchplan was interested to provide local assistance, such as the construction of scaffolding, and TWI was displeased with certain things that Matchplan was alleged to have done.

[32] The first letter was dated 3 September 1996. Its heading bore, besides other things, the word 'COPY' followed by the names of four persons. In any other letter it would be an indication that it was intended that copies of the letter were to be sent to the named person or persons. The four persons were David Richards of the International Cricket Council ('ICC'), Jagmohan Dalmiya of the Asian Cricket Council ('ACC'), and Karu Selvaratharn and Dr Harjit Singh, both of the MCA (Malaysian Cricket Association). In the sixth paragraph of the letter Sinrich said: 'I am copying this letter to David Richards at the ICC and J Dalmiya at the ACC …'. Karu Selvaratharn and Dr Harjit Singh were not mentioned there.

[33] The second letter was dated 6 September 1996. Against, the word 'COPY' was the name of only David Richards of the ICC.

[34] On 20 February 1997, the International Vice-President, Legal, of TWI wrote to the appellants' solicitors a letter the first paragraph of which contained four numbered subparagraphs. Subparagraph 1 said this:

> Although Mr Sinrich contemplated copying his letter of 3 September 1996 to David Richards (ICC), Jagmohan Dalmiya (ACC), Karu Selvaratharn (MCA) and Dr Harjit Singh (MCA), he did not in fact do so. You will have noticed that in his subsequent letter of 6 September 1996 Mr Sinrich did not purport to copy it to third parties. Consequently, there has been *no publication* by Mr Sinrich to these individuals. (Emphasis added.)

[35] Subparagraph 3 said this:

> Since there has been no publication in Malaysia (or, indeed elsewhere) we cannot see that your clients' claim is justiciable in the Courts of Malaysia.

[36] I omit subparas 2 and 4 because they are not relevant to the issues that arose in the appeal. The letter ended as follows:

> In conclusion, Mr Sinrich very much hopes that in the light of the contents of this letter the matter can be treated as at an end. Without inviting further correspondence on the issue, if you disagree with anything in this letter, I should be grateful for the opportunity of dealing with any further points that arise.
>
> If not, we should be grateful for your confirmation that the matter can now be regarded as closed.

[37] The appellants nonetheless did not regard the matter as closed. They took steps to sue the foreign respondents for libel. They filed the writ action in Kuala Lumpur. Paragraph 11 of the statement of claim dated 8 October 1998 alleged, as regards the first letter, that 'copies thereof were forwarded to and words contained therein were published to' the four persons. As regards the second letter, para 12 alleged that 'a copy thereof was forwarded to and words

contained therein were published to David Richards of the International Cricket Council'. The statement of claim did not allege publication to any other person.

[38] Service of the notice of the writ was effected on the respondents in England.

[39] After entering conditional appearance, the respondents filed their application for the setting aside of the action. It was made in reliance on O 12 r 7(1) of the RHC and on the inherent jurisdiction of the court. Order 12 r17(1) provides, as far as material, as follows:

> A defendant to an action may at any time before entering an appearance therein, or, if he has entered a conditional appearance, within 14 days after entering the appearance, apply to the Court for an order setting aside the writ or service of the writ, or notice of the writ, on him …

[40] Strictly, since the application was made under O 12 r 7(1), the order sought should have been an order setting aside the notice of the writ or its service on the respondents, rather than an order setting aside the action, but the effect of either order would be the same and nothing arose in the appeal before us touching the prayer.

[41] In the respondents' affidavit dated 24 June 1999 in support of their application, Sinrich asserted that the two letters were sent by fax only to Wilmott in Malaysia at his office in Matchplan's premises and were never sent by any means to any third party in Malaysia; that although the first letter stated that it would be copied to Jagmohan Dalmiya, Karu Selvaratharn and Dr Harjit Singh, in actual fact copies of it were never sent to them; and that, as regards David Richards, who was based in England, copies of the letters were never sent to him in Malaysia. Sinrich argued in the affidavit that for the Malaysian courts to have jurisdiction to try a defamation action, publication of the defamatory matter must be made to a third party in Malaysia and that since, in this case, there was no publication to a third party in Malaysia, the Malaysian courts had no jurisdiction to try the action.

[42] There were two other grounds for the application, but I shall not deal with them here because my decision on the appeal was not on any of those grounds.

[43] The appellants did not reply to the respondents' affidavit. As to that, this was what the learned judge said at p 4 of his grounds of judgment:

> What is surprising is that the plaintiffs failed to file any reply to counter the averments of the first defendant in his affidavit in support of the application. The averments of facts such as the denial that copies were in fact sent to the persons named in the letter, were not challenged in any way by the plaintiffs. Whilst I agree that the plaintiffs might have no evidence to challenge such a denial, all that was required was for the plaintiffs to challenge that fact by requiring strict proof from the defendants that notwithstanding the fact that third party names were mentioned in the said two letters, copies of these two letters were indeed not sent to them.

[44] The learned judge arrived at this conclusion:

> It is trite law that in order to establish that this Court has jurisdiction to try this action, the plaintiffs have to prove that the said two defamatory letters were published in Malaysia. In order to constitute publication in Malaysia, the plaintiffs are required to prove that the said letters were published to a third party in Malaysia and not just to the plaintiffs. Since the affidavit of the first defendant clearly denies any publication to any third party and since there is no challenge to that denial I must accept such denial as true and thus accede to the defendants' application. On this ground alone I decided, without the need to consider the other issues raised, to allow the appeal and to set aside the decision of the learned SAR.

[45] For service of the writ on the respondents outside the jurisdiction the appellants relied on O 11 r 1(1)(h) which renders permissible service of a writ out of the jurisdiction with the leave of the court — which was obtained in this case — 'if the action begun by the writ is founded on a tort committed within the jurisdiction'. For the tort of libel to be committed within the jurisdiction, the publication of the matter complained of must be to a third party within the jurisdiction. Otherwise, no tort of libel is committed within the jurisdiction, O 11 r 1(1)(h) will not apply, the Malaysian courts will have no jurisdiction over the case against a foreign defendant, the service of the notice of the writ in this case on the respondents outside the jurisdiction would not have been permissible, and the service of the writ on them — and effectively the action against them — could be set aside under O 12 r 7(1).

[46] In this case, the question of publication to a third party in Malaysia is relevant only as far as it involved Karu Selvaratharn and Dr Harjit Singh of the Malaysian Cricket Association and the first letter, because it was acknowledged in submission in the appeal that they were the ones who were resident in Malaysia, being Malaysian, and to whom only publication within the jurisdiction could have been made. There was no question of publication within the jurisdiction to the other two persons or of publication within the jurisdiction of the second letter.

[47] If on the hearing of the respondents' application it could be established that there was no publication in Malaysia to those two persons — if the court could at that stage gaze into the past, as it were, and see that in truth copies of the first letter were not sent to them — the action merited being set aside, for there would have been no point in going to trial to establish otherwise. What the judge had before him was a solemn averment in an affidavit as to a fact that was capable of being verified to be untrue if it was untrue, that is, that copies of the letter were not sent to those two persons. Now I do not say that a senior international vice-president of a company is always a truthful man, but when such a person makes a solemn averment as to such a fact, the court must begin with the supposition that the averment is true unless and until it is challenged or it is shown that it ought not to be accepted as true without further enquiry. In this case, the appellants did not respond by affidavit to the averment, thereby failing to show the stand that they took as to the fact in face of the averment. They did not challenge the respondents to reinforce their averment with proof or indicate that they had evidence that copies of the letters were in fact sent to the two persons. In fact,

throughout the appellants' written submission in the appeal, there was not the slightest indication that the appellants, who had been informed that copies of the two letters were not sent to the two persons even as far back as more than one year before they commenced proceedings, knew as a matter of fact that copies of the first letter were sent to the two persons. In the circumstances, I concluded that the judge was right in accepting the averment as true.

[48] The appellants' stand in face of the information and of the subsequent averment by affidavit seemed to be manifested in para 8 of their skeletal submission in the appeal, which I reproduce:

> The learned judge erred in law and fact when he accepted the averments by the first respondent in his affidavit that the two defamatory letters admittedly written by him and addressed to the second appellant and sent to the first appellant were not sent to the Third Parties named in the letters to whom they were copied, two of whom are resident within the jurisdiction based solely on the ground that the appellants had not denied the averments of the first respondent by filing an affidavit in reply. By doing so the learned judge was in fact disregarding the fact of the estoppel on the part of respondent and by the second appellant establishing a cause of action when applying for leave to serve the notice of the writ on which an order had already been made and the fact that the respondents had yet to submit to the jurisdiction of this honourable court.

[49] By that paragraph the appellants were in effect saying that even though the respondents' averment was not responded to by affidavit, it ought not to be accepted as true in view of three considerations: first, estoppel; second, leave to serve notice of the writ; third, non-submission to jurisdiction. In my view, there was no merit in the appellants' reliance on the three considerations.

[50] As to estoppel, that was dealt with in para 7 of the appellants' skeletal submission. I quote the crucial part:

> … the respondents were estopped from denying that the copies were sent to the third parties when they had by their conduct and actions led the appellants to believe that the said letters were in fact sent to the named third parties to whom they were stated to be copied to and consequently to act on such belief.

[51] The appellants were in effect arguing that by the respondents' act of giving an indication in the first letter about its being copied to the two persons, the appellants believed that it was in fact copied to them and acted on that belief, and therefore the respondents ought not to be allowed to deny that copies of the letter were in fact sent. I have said that throughout the written submission there was not the slightest indication that the appellants knew that copies of the letter were in fact sent to the two persons. Paragraph 7 confirmed that the appellants were not standing on actual fact and truth but on a doctrine or principle, that of estoppel. The appellants relied on *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 for the proposition that a plaintiff may have recourse to estoppel to 'assist [him] in enforcing a cause of action … by preventing a defendant from asserting the existence of some fact the existence of which would destroy the cause of action' (p 345C–D), the fact

being asserted here being that the respondents did not in actual fact send copies of the first letter to the two persons. But of paramount importance is this pronouncement at p 344F:

> The time has come for this court to recognize that the doctrine of estoppel is a flexible principle by which justice is done according to the circumstances of the case. It is a doctrine of wide utility and has been resorted to in varying fact patterns to achieve justice. Indeed, the circumstances in which the doctrine may operate are endless.

[52] Estoppel is to be used to achieve justice. It is not to be used so as to result in injustice.

[53] When a man writes a letter to *A* and gives in it an indication of its being copied to *B*, and sends the letter to *A*, the most that can be said about such an indication is that, if it is to be taken as a representation to *A*, it is a representation that the writer intended to send a copy of the letter to *B*, not that it had been sent to *B*, although *A* may be forgiven for assuming or believing that it was in fact sent to *B*. If a copy of the letter was not in fact sent to *B*, that fact is not inconsistent with the representation, because intention and the carrying out of it are two different things, and having an intention but not carrying it out are not inconsistent. It would be an unjust and unjustified denial of the right to establish truth to use estoppel to prevent the man from asserting that a copy of the letter was not in fact sent to *B*. So it would be in this case where, moreover, in the first letter, notwithstanding the indication in its heading, when it came to expressly stating to whom he was copying the letter, Sinrich mentioned only David Richards and J Dalmiya, not the two Malaysians. Even so, in his affidavit Sinrich asserted that the first letter was not in fact sent even to Dalmiya.

[54] As to leave to serve the notice of the writ, the appellants' argument was in para 5 of their skeletal submission, which I quote:

> The appellant's [*sic*] also contends that the application for leave to issue and serve the writ of summons notice out of the jurisdiction was supported by the aaffidavit of one Brian Wilmott verifying the fact that the said defamatory letters dated 3 September 1996 and 6 September 1996 were written and published by the respondent's [*sic*] and at the hearing of this application for leave the court was satisfied that this was a proper case for service out of jurisdiction in accordance with O 11 r 4 of the RHC. The burden on the appellant's [*sic*] at *this stage under O11 r 4* was not to 'satisfy' the court that he was right but to make it sufficiently to appear that the case was a proper one for service out of jurisdiction and for this purpose it was not necessary to prove the fact beyond all reasonable doubt provided that there was a good arguable case for otherwise it would amount to trying the case ex parte before it had been heard. (Emphasis added.)

[55] It was about the stage of the appellants' application for leave to issue and serve the writ out of the jurisdiction, which was applied for, necessarily, ex parte. But the appellants did not there state what their argument was as regards the bearing that that stage had on the respondents' subsequent application to set aside under O 12 r 7. If they meant to say that because they had succeeded in obtaining leave at that stage on the basis that they had a good arguable case, the respondents were not entitled to show on their

application under O 12 r 7 that the appellants had no case at all against them within the jurisdiction, then they would be denying the *raison d'etre* of O 12 r 7. And it was not their argument that O 12 r 7 was restrictive as to the matters that need to be shown to succeed in an application under it.

[56] The appellants cited two cases in relation to their para 7, but I could not see how the cases benefited them. *Vitkovice Horni A Hutni Tezirstvo v Korner* [1951] 2 All ER 334 was cited merely as an authority for what a plaintiff needs to show on an application for leave to serve notice of a writ out of the jurisdiction. It does not concern the setting aside stage.

[57] The other case was *Attock Cement Co Ltd v Romanian Bank for Foreign Trade* [1989] 1 All ER 1189. It was about a performance bond. The plaintiffs had obtained leave to serve a writ on the foreign bank concerned out of the jurisdiction on the ground that the performance bond was governed by English law and subject to English jurisdiction. The bank applied to set aside the grant of leave. The judge granted the application. The Court of Appeal dismissed the plaintiffs' appeal, holding that the plaintiffs did not have a good arguable case that the performance bond was governed by English law. So, as may be seen, although at the leave stage it might have been found that there was a good arguable case, at the setting aside stage it was permissible, nay, necessary, to show otherwise, and it was shown otherwise.

[58] The following passage by Staughton LJ is enlightening. It appears at p 1194c–d:

> The standard of proof that an action falls within the provisions of O 11 r 1 is a topic which frequently arises in practice. At the ex parte stage, the master or judge looks to see whether the facts deposed to in the plaintiff's affidavit, if true, bring the case within the rule. At that stage he has only the plaintiff's evidence, although it should include by virtue of the plaintiff's duty of disclosure such information or documents as are available to the plaintiff and demonstrate what may be the defendant's case. No doubt the master or judge will refuse leave ex parte if the plaintiff's evidence is, in a word, incredible. Otherwise he will grant leave if the facts deposed to satisfy O 11 r 1. Nothing that I say touches on the practice at that stage.
>
> It is when the defendant applies to set aside service that the problem is more likely to arise. The court may then have conflicting evidence or arguments …

[59] So at the setting aside stage, conflicting evidence or arguments do, and have to, arise as to the truth of the assumed facts on the basis of which leave was earlier granted. The conclusion for the question is at pp 1196h–1197a:

> It is to my mind plain from the *Vitkovice* case that a master or judge may on some occasions find himself obliged to assess the relative strength of the plaintiff's and the defendant's cases. In doing so, he does not try the case on affidavits, because he reaches only a provisional conclusion: the stage for trial and for final decision has not been reached. But he must have regard to all the admissible material before him, as Lord Simonds and Lord Radcliffe said, not just the plaintiff's case. He must conclude that there is a good arguable case (Lord Simonds), not just a case that can be argued, or a strong argument (Lord Radcliffe). What need not be shown is that the plaintiff is right beyond all reasonable doubt.

A Save in the speech of Lord Tucker, which deals with a special problem, I cannot find in the decision any express consideration of the balance of probability. Nevertheless I conclude that, where there is a disputed question of fact which is essential to the application of O 11 r 1, the judge must reach a provisional or tentative conclusion that the plaintiff is probably right on it before he allows service to stand. The nettle must be grasped, and that is what I take to be meant by a good arguable case.

B

[60] At the setting aside stage, 'the nettle must be grasped'. It means that, faced with the applicant's averments which raise disputes of fact, the plaintiff must fight out the dispute and persuade the judge that he has a good arguable case that the facts contended for by him are true. He cannot fall back on his success in obtaining the leave which he obtained only on the assumption that the facts were true. Now, at the setting aside stage, he must show that, despite the applicant's contentions, there is still a good arguable case that his facts are true. The applicant, on his part, has to be entitled show that there is not even a good arguable case that the plaintiff's facts are true.

C

D **[61]** As to non-submission to jurisdiction, the appellants' argument was in para 6 of their skeletal submission. I quote the crucial part of it.

The learned judge erred in law and fact by going into the merits of the cause of action and accepting the evidence of mere denial of publication within the jurisdiction as being true as alleged by the respondents when they had not as yet submitted to the jurisdiction of this honourable court and the veracity of the same was not tested by *viva voce* evidence. A trial of merits of the case at this stage was naturally out of the question as long as the statement of claim disclosed a reasonable cause of action in tort. The appellant's also contends that the respondents had in fact admitted that the said defamatory letters were sent by facsimile to the second appellant in Malaysia at the first appellant's office. (see affidavit of the first respondent at para 11 p 92 RA).

E

F **[62]** The first sentence suggested that because the respondents had not yet submitted to the jurisdiction of the Malaysian courts, the court ought not to hear them on their plea that there had not been publication in Malaysia. I supposed that what the appellants meant by saying that the respondents had not yet submitted to the jurisdiction of the Malaysian court was that they had only filed a conditional appearance to the writ in order to contend that the Malaysian High Court had no jurisdiction to try the action. But that was so only as far as the writ was concerned. Order 12 r 7 entitled the respondents to come to court for a decision on their plea that the court had no jurisdiction. They exercised their right, thereby submitting to the jurisdiction of the Malaysian High Court to decide the question of jurisdiction. They were then entitled to show why they claimed that the court had no jurisdiction.

G

H

[63] The second sentence of para 6 seemed to suggest that so long as a statement of claim discloses a reasonable cause of action, the intended defendant is precluded from showing on an application under O 12 r 7 that the facts on which the claim is based are not true. The unsoundness of the suggestion has already been shown by the passages from *Attock Cement* that I have quoted, and I merely wish to say that of the three authorities cited in support of para 6, the authority that seemed to be intended for the second

I

sentence was *American Express Bank Ltd v Mohamed Toufic Al-Ozeir & Anor* [1995] 1 MLJ 160, and that that authority too did not assist the appellants in that respect.

[64] It was a claim in tort for damages against a foreign bank for fraudulent misrepresentation. The appellant plaintiffs had obtained leave to serve notice of the writ of summons out of the jurisdiction on the foreign bank. The foreign bank applied for an order setting aside the order granting leave, the notice of the writ of summons, and its service on them. One of the grounds for the application was that the tort was not committed in Malaysia, and therefore the Malaysian courts had no jurisdiction to hear the claim, it being contended that the tort of fraudulent misrepresentation, where the misrepresentation is made by telephone or telex, is committed at the place where the message is sent, in this case the foreign country, Singapore. The judge dismissed the application, holding that in such a situation the tort is committed at the place where the message is received, in that case Malaysia, and so the High Court in Malaysia had jurisdiction over the claim. The foreign bank appealed to the Supreme Court, which dismissed the appeal.

[65] I quote holding [1] in the report:

> A Malaysian Court has jurisdiction over a foreign defendant at common law if the said defendant is residing in Malaysia or if he submits to jurisdiction if not so present. However, if he is not present here and has not submitted to jurisdiction, the Malaysian Court can assume such jurisdiction statutorily under O 11 r 1 of the Rules of The High Court 1980, as jurisdiction is implicit in the power to grant leave by the High Court for service out of jurisdiction. Further, O 11 r 1(1)(h) of the RHC expressly provides for service out of jurisdiction 'if the action begun by writ is founded on a tort committed within the jurisdiction'. In the present case, although the appellant was not present within the jurisdiction and had not submitted to the jurisdiction of the Malaysian Court, the fact remains that the statement of claim was cast in tort committed in Malaysia. The Malaysian court therefore had jurisdiction to entertain the claim of the respondents and the learned judge was right in ruling the way he did on this issue.

[66] The last two sentences might be construed to mean that the Supreme Court dismissed the appeal and held that the Malaysian court had jurisdiction simply because 'the statement of claim was cast in tort committed in Malaysia'. It was probably on that view of the case that the appellants made the suggestion stated earlier, that seemed to lurk behind the second sentence of para 6 of their skeletal submission. But it was not for that reason that the Supreme Court found that the Malaysian court had jurisdiction. The Supreme Court found that there was jurisdiction for the same reasons as the judge gave, not simply because the statement of claim was cast in tort committed in Malaysia. At p 279b, the Supreme Court said: 'We are in agreement with the view of the learned judge about the point of jurisdiction'.

[67] I have read in draft my learned brother Gopal Sri Ram JCA's grounds of judgment. I gather from paras 13 and 14 that he holds the view that in an application under O 12 r 7 an allegation in the statement of claim must be assumed to be true. He cites *Vanity Fair Mills Inc v T Eaton Co Ltd* [1956] 25 CPR 61 and *Rediffusion (Hong Kong) Ltd v Attorney-General of Hong Kong*

[1970] AC 1136. The two cases were not cited by the appellants. I have since looked at the reports. I fail to see in the headnote of *Rediffusion* any decision or principle in the case that has a bearing on an application under O 12 r 7 and my learned brother has not quoted any passage from the body of the judgment that he relies on. *Vanity Fair Mills* was a dispute between a United States company (the plaintiffs) and a Canadian company over rights in the trade mark 'Vanity Fair' when used in connexion with women's underwear. The plaintiffs' 'complaint' in a district court of the United States sought injunctive relief against the use by the defendants of the trade mark in connexion with women's underwear both in Canada and the United States, and other reliefs. The defendants moved to dismiss the complaint under r 12(b) of the Federal Rules of Civil Procedure on the grounds, inter alia, that the district court lacked jurisdiction over the subject matter of the complaint insofar as it related to the defendants' alleged trade mark infringement in Canada. The district court held that it lacked subject matter jurisdiction over that portion of the complaint that raised Canadian trade mark issues. The plaintiffs appealed to the United States Court of Appeal for the Second Circuit. It was in the judgment on the appeal that Waterman, Circuit Judge, uttered the following words which are cited by my learned brother:

> Although the parties presented many affidavits, depositions, and exhibits for the consideration of the district court, there has been no trial of facts, and the complaint is unanswered. On an appeal from a judgment granting a motion to dismiss a complaint for lack of federal jurisdiction, we must assume the truth of the facts stated in the complaint.

[68] I do not have the benefit of knowing what r 12(b) of the Federal Rules of Civil Procedure, under which the defendants' motion to dismiss was made, says so as to enable me appreciate the circumstances in which resort to it is available. But if under United States law in all cases in which a defendant raises before trial a question of jurisdiction in order to put an end to the plaintiff's action against him, including cases possessing the like procedural circumstances as the present case, the truth of the facts asserted by the plaintiff cannot be questioned, then the law is in conflict with *Attock Cement*, which I think is the correct law as to the material to be considered in an application to set aside service of a writ out of the jurisdiction on a foreign defendant.

[69] Those are the reasons why, as I said, I was of the view that there was no merit in the three considerations that the appellants relied on for taking the stand in the appeal that the respondents' assertion that they did not send copies of the first letter to the two Malaysians ought not to be accepted as true at the stage of the setting aside application.

[70] In para 9 of their skeletal submission, the appellants argued that '[Sinrich] knew when he faxed the said defamatory letters that there was a possibility that the letters would be read by some other person, for example, by [Wilmott's] partner or staff …'. That argument was probably based on this statement that begins at the bottom of p 532 of Gatley on *Libel and Slander* (5th Ed): 'And there is evidence of publication if it be proved that the defendant knew when he posted a letter defamatory of the plaintiff that

it would be likely to be opened by some other person, for example, by the plaintiff's partner or clerk'. I was of the view that the argument ought not to be entertained because the appellants' pleaded case was publication to the four persons. They were not concerned about being defamed in the estimation of Wilmott's partners and staff. Even after being told more than a year previously that copies of the letters were not sent to the four persons, the appellants chose to institute their action on the basis of publication to them and not also to others in Wilmott's organization. An application under O 12 r 7 must be decided on the claim as then pleaded because it is only on that basis that an applicant can possibly act under the rule. It might be possible, as submitted orally by learned counsel for the appellants, for the statement of claim to be amended to allege publication to other persons, but until that happened the respondents could only act on what was currently pleaded. That being the case, it would not be fair to set up against the respondents, to frustrate their application, a basis of claim that might be pleaded in the future.

[71] For the reasons that I have given, I was of the view that the learned judge was right in accepting it as true that there was no publication within the jurisdiction and in consequently allowing the appeal to him and setting aside the action, and that accordingly the appeal before us should be dismissed.